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Nos. 08-424, 08-431

Supreme Court, U.S.
FILED
NOV 18 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, *ET AL.*,
Petitioners,

v.

CENTER FOR BIOETHICAL REFORM, *ET AL.*,
Respondents.

ART ROBERTS,
Petitioner,

v.

CENTER FOR BIOETHICAL REFORM, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case does not meet the requirements for review based on the criteria for granting certiorari. The law prohibiting content-based restrictions on political speech in a traditional public forum is well established, as is the law regarding Fourth Amendment seizures. The Ninth Circuit's unanimous decision properly applied this well settled law to the facts presented. *See* Sup. Ct. R. 10 (noting, for example, that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Consequently, this is not the type of case that is ripe for this Court to review, and Petitioners' claim of a conflict with this Court's precedent is illusory. In the final analysis, disturbing the Ninth Circuit's opinion will have the deleterious effect of eroding well established constitutional protections afforded all law abiding citizens.

1. Whether government officials can impose a *content-based* restriction on a private, adult citizen's peaceful, silent, and non-obstructive political speech in a traditional public forum simply because the forum is adjacent to a public school.

2. Whether it was clearly established in March 2003 that law enforcement officers who conducted a *Terry* stop that revealed no evidence of criminal activity within the first few minutes of the detention, yet detained law-abiding citizens for seventy-five minutes while the officers tried to find some *legal* basis for charging the citizens with a crime could face civil liability for violating the Fourth Amendment.

RULE 29.6 DISCLOSURE

None of the Respondents in this action has a parent corporation or any stock owned by publicly held corporations.

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INTRODUCTION

This is a single response to the petitions filed by Petitioners Los Angeles County Sheriff's Department, Xavier Aguilar, Dave Despot, Mark Darling, and Mark Repcik ("LACSD Petitioners") (case no. 08-424) and Petitioner Art Roberts (case no. 08-431) (collectively referred to as "Petitioners").

Stripped of the histrionics and hyperbole, Petitioners' arguments invite this Court to disregard decades of well established First Amendment principles and precedent by declaring the public streets and sidewalks adjacent to public schools off limits for speech that government officials find offensive. *But see Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) ("[T]he public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public."). This Court should decline the invitation and deny the petitions.

STATEMENT OF THE CASE

A. Respondents Were Engaging in Peaceful, Silent, and Non-Obstructive Political Speech in a Traditional Public Forum.

Respondents are members of the Center for Bio-Ethical Reform, which is a non-profit organization whose main purpose is to promote "prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable peoples through education and the development of innovative

educational programs." App. at 4a.[1] One such program is the "Reproductive Choice Campaign," which seeks to "expose as many people as possible to the reality of abortion" by displaying large, graphic photographs of first-term aborted fetuses on the sides of trucks as they drive the public streets. App. at 4a. Respondents' photographs present a visual message that is rhetorically inexpressible. This visual message is Respondents' speech. *See* App. at 5a ("[Y]ou can't teach inexpressively horrific historical fact in exclusive reliance on the written or spoken word.").

On March 24, 2003, Respondents were driving their vehicles and displaying their political message on the public streets adjacent to the Dodson Middle School while students and faculty were arriving prior to the start of the school day.[2] App. at 6a, 11a-12a, n.3. Respondents commenced their speech activity at about 7:30 a.m. ER-63, 106, 130, 135, 140-41, 274.[3] Classes do not begin until 8:01 a.m.[4] App. at 7a; ER-274.

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[1] The citations refer to the appendix included in the petition filed by LACSD Petitioners.

[2] Consequently, Respondent's audience consisted of faculty, parents, students, commuters, pedestrians, and residents of the neighborhood where the school is located. The school contains grades 6 through 8 (the *typical* age range for these grades is 11 to 14 years old) and serves approximately 2,000 students.

[3] "ER" refers to Respondents' Excerpts of Record filed in the Ninth Circuit.

[4] Respondents drove their vehicles for approximately 30 minutes prior to being detained by Petitioners. ER-106, 328. The only reason why Respondents remained in the vicinity of the school

While engaging in their speech activity, Respondents were obeying all of the applicable laws. They were not obstructing or blocking anyone's passage, not causing or creating any traffic accidents or other traffic related problems, not making any loud or disturbing noises, and not violating any traffic code provisions.[5] ER-62-63, 66, 68-70, 97-98, 167-68, 176-80, 216-17, 227-29.

At no time on March 24, 2003, did Respondents come into any school building or upon any of the school grounds; Respondents' speech activity was confined to the public streets. At no time did Respondents use any sound equipment or sound amplification devices. At no time did Respondents block, obstruct, or impede in any way anyone's use of or access to any of the public streets, public ways, or entrances to the school. At all times Respondents were acting peacefully. And at all times Respondents were driving carefully, obeying the posted speed limits and other applicable traffic regulations. ER-66, 167-70, 216-17.

B. There Was No "Material Disruption" or "Substantial Disorder" at the School.

There was no "material disruption" or "substantial disorder" at the Dodson Middle School on March 24, 2003. While the content of Respondent's political message may have been "disruptive" to some, on this day students were arriving at school in an orderly

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beyond the time when classes began was because LACSD Petitioners wouldn't allow them to leave.

[5] *See also* the video evidence provided in the DVD that was lodged with the district court. ER-169-70.

manner. Some students looked at Respondents' pictures and turned away, continuing on with their business, other students did not bother to look. ER-87, 88, 97, 98, 169-70. Classes at the school started and ended on time, the schedule of the day did not change, and no classes were canceled.[6] ER-278, 313; *see also* App. at 7a.

Petitioner Art Roberts, the assistant principal, testified as follows:

> Q. At 8:01 did you have all the students in the campus on March 24th, 2003?
> THE WITNESS: We had a fairly normal opening.
> BY MR. MUISE:
> Q. What does that mean?
> A. That means that there was *some disruption*, but despite that we had a *fairly normal opening*.

ER-312 (emphasis added); *see also* App. at 7a (finding that the school had a "fairly normal opening" and that the students "were on the campus by the start of classes at 8:01 a.m.").

None of the LACSD Petitioners who were present at the school on March 24, 2003, observed any disruption or disturbance caused by Respondents, including Petitioner Mark Darling, who closely followed Respondents as they drove on the public

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[6] Petitioner Roberts notes "that school started at 8:01 a.m., on schedule, with students in their classrooms," grudgingly conceding that there was no "material" or "substantial" disruption or disorder caused by Respondents' speech activity. *See* Roberts Pet. at 20.

streets past the school. ER-163-64, 176-80, 221, 231-32, 288-89.

C. Petitioners Employed a Content-Based Restriction to Silence Respondents' Political Speech.

In response to a complaint from school officials,[7] LACSD Petitioners stopped and detained Respondents for at least seventy-five minutes, during which time Respondents were not free to leave. ER-181-82, 189, 205-06, 218, 335. Respondents were stopped, detained, and eventually told to leave because of the reaction that a few people were having to Respondents' pictures. ER-111-12, 195-98, 217, 228-29, 286. Petitioners invoked California Penal Code § 626.8 as the authority to stop Respondents' political speech. ER-65-66, 299, 304.

Petitioner Darling testified as follows:

> Q. During that time that you were following those vehicles, during that five-minute period of time, was there anything that you observed that would lead you to believe that [Respondents] were in violation of § 626.8?
> A. Yes.
> Q. And what was that?

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[7] School officials were responding to complaints from a few parents and neighbors. ER-302-03. The official complaint stated, in relevant part, "'Anti-abortion' truck with offensive language/pictures is circling the school . . . ." App. at 7a; *see also* ER-268 (describing Respondents' vehicle in an incident report as "a truck with anti-abortion propaganda/pictures").

A. Due to the nature of the graphic pictures on the sides of the panel truck.
Q. And what is it about the nature of the pictures?
A. They're just very graphic and kind of in your face of an unborn aborted fetus.

ER-196.

At the time they detained Respondents, LACSD Petitioners knew that Respondents' purpose was to make a political statement. ER-155, 156, 192, 220, 223-24, 226; *see also* ER-237-42, 268. That is, they knew that Respondents were exercising their right to freedom of speech. Nevertheless, Petitioners invoked § 626.8 to prohibit Respondents' speech despite the fact that this penal code section expressly states that it "shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly." ER-52, 165-66, 290-91; App. at 64a.

Petitioner Darling testified as follows:

Q. Did you understand that what they were doing was demonstrating their view regarding abortion?
A. Yes.

ER-192.

Testimony of the LACSD Petitioners further demonstrates that Respondents were stopped and detained because of the content of their political message and certain viewers' reactions to this message.

Petitioner Mark Repcik testified as follows:

> Q. So then, is it your understanding that the disruption was a reaction to what Respondents were doing?
> A. Yes.
> Q. And in this case, is it your understanding that the reaction was to the graphic pictures that were on the sides of the truck?
> A. Yes.

ER-228-29.

Similarly, Petitioner Darling testified as follows:

> Q. Is it fair to say that, at the time, you didn't have any concern with what was inside the truck but what was on the outside of the truck?
> A. Yes.
> Q. And that being the pictures they referred to?
> A. Yes.

ER-198.

During the detention, LACSD Petitioners escorted Petitioner Roberts over to Respondents, and Roberts told Respondents that their pictures were disruptive and that they had to leave the area. Petitioners advised Respondents of the content of § 626.8, reading verbatim portions of this penal code. Petitioners told Respondents that they have been informed pursuant to § 626.8, and they must now leave and not return with their pictures. ER-65, 66, 299, 328.

Consequently, Respondents' "speech was permitted until the students and drivers around the school

reacted to it, at which point the speech was deemed disruptive and ordered stopped under § 626.8." App. at 16a.

D. LACSD Petitioners Seized Respondents for Seventy-Five Minutes in order to "Fish" for a Crime.

Based on the testimony of LACSD Petitioners, it takes only several minutes to run a check on a person's driver's license and vehicle registration for warrants or any other suspicious or criminal activity. ER-183-85, 209-12. LACSD Petitioners determined at the beginning of the stop that Respondents were expressing their view in opposition to abortion. ER-192, 242-45, 268, 270. Nevertheless, the detention lasted at least seventy-five minutes. ER-335.

As the record shows, not only did LACSD Petitioners not witness any disruption caused by Respondents, they also did not make a "quick" investigation of the veracity of the complaint from the school officials. LACSD Petitioners did not speak to a school official until more than one hour into the detention. ER-109-10; *see also* ER-161. And this "wasn't much of a conversation," according to Petitioner Roberts, the school official they spoke to. ER-314.

Accordingly, the record reveals no justifiable explanation for why it took seventy-five minutes to investigate the relevant facts. App. at 28a-32a. As the Ninth Circuit concluded, "neither California Penal Code § 626.8 nor the search for other code provisions that might have been violated justified the Deputy Sheriffs in detaining [Respondents] for seventy-five

minutes while the sheriffs tried to find some basis for charging them." App. at 32a.

E. The Loss of Respondents' First Amendment Rights Caused Irreparable Harm.

Because of Petitioners' enforcement of § 626.8, which carries penalties of a fine and imprisonment, and Petitioners' order to leave the surrounding public streets and not return with their pictures, Respondents departed and will not return to continue their speech activity. ER-136-39, 88; *see also* ER-161, 193, 255, 293.

REASONS FOR DENYING THE PETITION

In its decision, the Ninth Circuit applied established law to the undisputed facts and reached a decision that is consistent with this Court's jurisprudence. Consequently, there is no conflict with this Court's precedent, nor does this case call for a departure from it. Indeed, departing from these well established principles of constitutional law will have the deleterious effect of eroding fundamental constitutional rights.

I. Petitioners' Content-Based Restriction on Respondents' Political Speech Violated Fundamental and Long-Standing Principles of First Amendment Jurisprudence.

The First Amendment plainly protects Respondents' use of pictures to publicly express their political message in traditional public fora. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) (recognizing that petitioners' "leafletting, sign

displays, and oral communications are protected by the First Amendment"). And this Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted).

Moreover, this Court has long recognized that all public streets are properly considered traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting that "all public streets are held in the public trust and are properly considered traditional public fora"). Public streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This Court has emphasized that "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

Contrary to the arguments advanced by Petitioners, the public streets adjacent to the Dodson Middle School are no exception. They too are a traditional public forum for the purposes of Respondents' speech activity. *See Grayned*, 408 U.S. at 118 ("[T]he public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public.").

Consequently, the public forum doctrine gives meaning and effect to the command of the First Amendment by protecting Respondents' speech even if it is expressed on public streets adjacent to a school. *See, e.g., Schneider*, 308 U.S. at 163; *Grayned*, 408 U.S. at 115, 120 (upholding an anti-noise ordinance against a facial challenge, but noting that the "government has no power to restrict [speech] activity because of its message" and noting that the ordinance "gives no license to punish anyone because of what he is saying").

In the final analysis, Respondents' political speech in a traditional public forum must be accorded the greatest protection under the First Amendment. In this case, however, Petitioners are asking this Court to criminalize Respondents' peaceful, silent, and non-obstructive political speech because of the reaction of a few "listeners" (i.e., viewers) to the content of Respondents' message. This Court should reject Petitioners' efforts to undermine bedrock principles of the First Amendment.

A. Student Speech Regulations Do Not Justify Petitioners' Restriction on Respondents' Political Speech.

Although the government has an interest in maintaining an orderly classroom environment in its public schools, it does not follow that the public streets adjacent to these schools are places in which the government can eviscerate the First Amendment and its protections, particularly for non-students. Moreover, local school rules and regulations that prohibit certain student speech within the school and in the classrooms do not implicate the same level of

First Amendment protection afforded to private citizens engaging in silent, peaceful, and non-obstructive political speech in a traditional public forum.[8] The two forums are not comparable.

LACSD Petitioners quote *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1980), for the proposition that "[t]he First Amendment rights applicable to schools 'are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment.'" LACSD Pet. at 14. However, the relied upon quote reads more fully as follows: "[T]he First Amendment rights *of students in the public schools* are not automatically coextensive with the rights of adults in other settings." *Id.* (internal quotations and citation omitted) (emphasis added). Thus, the fact that school officials might create certain rules and regulations that limit student expression in the public schools does not mean that they have similar authority to limit the rights of adults to engage in peaceful, silent, and non-obstructive political expression in a traditional public forum that happens to be adjacent to a school. *Cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (upholding a school district's sanctions upon a student in response to his offensively lewd and indecent speech

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[8] Additionally, state and local laws that regulate activity in and around schools cannot trump the rights secured by the First Amendment. Petitioners seek to employ various provisions of the California Education Code and the California Penal Code to make "unlawful" Respondents' political speech. *See* LACSD Pet. at 24-25. These efforts must fail. This is particularly so considering the fact that the statute Petitioners chose to invoke expressly states that it cannot be used to restrict the rights of freedom of speech. *See* Cal. Penal Code § 626.8; App. at 64a.

given at a school assembly, but noting, "If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate").

LACSD Petitioners' reliance on this Court's recent decision in *Morse v. Frederick*, 127 S.Ct. 2618 (2007), is similarly misguided. *See* LACSD Pet. at 19-20, 22. In *Morse*, this Court was asked to decide "whether a principal may, consistent with the First Amendment, restrict student speech *at a school event*, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 2625 (emphasis added). The Court concluded that "she may." *Id.* What is significant about the Court's decision for purposes of this case, however, is that *Morse* affirmed that student speech, unlike a private, adult citizen's speech in a public forum, is treated differently—although, not that differently so as to completely erode the First Amendment. *See id.* at 2629 (refusing to adopt a rule that would permit the suppression of "offensive" speech and noting that "much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use"). As Justice Alito, joined by Justice Kennedy, noted in his concurring opinion, the Court's decision in *Morse* "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue. . . ." *Id.* at 2636. Justice Alito further observed that "[t]he opinion of the Court does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'"

id. at 2637, noting that he regards the restriction upheld in *Morse* "as standing at the far reaches of what the First Amendment permits," *id.* at 2638.

Unlike *Morse*, the case before this Court addresses the question of whether the government can impose a content-based restriction on a private, adult citizen's peaceful, silent, and non-obstructive political speech that takes place on the public streets, a quintessential public forum. The answer based on *Morse* is a resounding "no."

Consequently, Petitioners' reliance on cases involving student speech on school grounds or during school-sponsored activities and school events is misplaced.

Indeed, in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), the landmark case establishing a student's constitutional right to freedom of speech, this Court made an emphatic point that is most appropriate here:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national

> strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[9]

Id. at 508-09 (citation omitted).

B. The School Setting Here Provides No Basis for Petitioners' Content-Based Restriction on Respondents' Political Speech.

This Court should reject Petitioners' request to make public fora adjacent to public schools "First-Amendment-free zones." *See* LACSD Pet. at 14-26 (suggesting a "school exception" for First Amendment rights); *see also* Roberts Pet. at 21-25. In that regard, Petitioners' reliance on *Grayned v. City of Rockford*, 408 U.S. 104 (1972), is misplaced. *See* LACSD Pet. at 11, 16-18; Roberts Pet. at 19-21. As the Ninth Circuit observed, the focus of *Grayned* was on "*classroom* interruption" and "*Grayned* noted with approval that the ordinance did not restrict expressive activity before or after the school session, while the student/faculty audience enters and leaves the school—*the precise situation presented here.*" App. at 11a-12a, n.3 (internal quotations and citation omitted) (emphasis added). Accordingly, the Ninth Circuit appropriately held that "[t]he school setting here thus provides no

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[9] *Tinker* effectively forecloses Petitioner Roberts' request that school officials be granted the power to exercise what is effectively a prior restraint on speech in a traditional public forum so that the officials might "*prevent*" the potential "misconduct" of miscreant and heckling students from reaching a "tipping point." Roberts Pet. at 20 (emphasis added).

authority to engage in otherwise impermissible restrictions." App. at 11a-12a, n.3.

Grayned, however, is instructive in this sense: it makes plain that content-based restrictions on peaceful, silent, and non-obstructive political speech occurring in a public forum adjacent to a public school are prohibited. *Compare* Roberts Pet. at 19-21. The First Amendment permits no exception—and for good reasons, as discussed further in section C below.

At issue in *Grayned* was a city anti-noise ordinance that prohibited a person while on school grounds adjacent to a building in which a school was in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session. This Court rejected the facial challenge, holding that the ordinance was a valid content-neutral, time, place, and manner regulation of expressive activity. *See id.* at 115. The time, place, and manner examples this Court cited in upholding the ordinance illustrate the basis for its decision and demonstrate the infirmity of Petitioners' arguments here. In *Grayned*, this Court cited the following content-neutral regulations of speech: preventing two parades from marching on the same street simultaneously; prohibiting a demonstration or parade on a large street during rush hour because it would burden the flow of traffic; turning down the volume of overamplified loudspeakers that assault the citizenry; preventing violent demonstrations in public places; and allowing a silent vigil in a public library, but prohibiting someone from making a speech in the reading room. *See id.* at 115-16. Each of these examples deals with an aspect of expressive activity

unrelated to its message, as the Constitution demands.[10]

More fundamentally, the "material disrupt[ion]" and "substantial disorder" that concerned this Court in *Grayned* was "boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Id.* at 119. Clearly, the silent, peaceful, and non-obstructive political speech at issue here does not meet the "material disruption" or "substantial disorder" criteria necessary to restrict such activity in the first instance, particularly when the First Amendment prohibits the government from "pu ish[ing] anyone because of what he is saying." *See id.* at 119-20; *see also* App. at 11a-12a, n.3.

C. Petitioners' Restriction on Respondents' Political Speech Offends Well Established Principles of First Amendment Jurisprudence.

1. Content-based restrictions are prohibited.

It is a settled principle of law that Petitioners cannot restrict Respondents' political speech on

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[10] As these examples demonstrate, Petitioner Roberts misapprehends the distinction between a content-based speech regulation and one that is content-neutral. *See* Roberts Pet. at 17-18. The aspect of Respondents' speech activity that drew offense, and thus the restriction by government officials, was the content of the pictures. There is no escaping that established fact. Consequently, Petitioner Roberts' attempt to cast the restriction as a regulation on the "manner" of speech is unavailing.

content-based criteria. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). Similarly, it is a clearly established principle of First Amendment jurisprudence that a viewer's reaction to speech is not a content-neutral basis for regulating the speech. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949) (holding that speech may not be punished because it "stirred people to anger, invited public dispute, or brought about a condition of unrest"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); *Grayned*, 408 U.S. at 120 (upholding city's anti-noise ordinance that regulated disturbances caused near schools and noting that the ordinance "gives no license to punish anyone because of what he is saying"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect.'") (opinion of O'Connor, J.); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Cohen v. California*, 403 U.S. 15, 26 (1971) (noting that forbidding particular words would run the substantial risk of suppressing unpopular views in the process); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression

of an idea simply because society finds the idea itself offensive or disagreeable.").

Criminalizing Respondents' speech because their pictures were "disturbing" or causing a reaction in certain viewers, as Petitioners sought to do in this case, is not a content-neutral basis for regulation. Indeed, the First Amendment knows no heckler's veto. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 880 (1997) (holding that a certain provision of the Communications Decency Act was unconstitutional because "[i]t would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech").

In a similar case, the California Supreme Court eloquently conveyed the essence of the First Amendment issue at stake here. In *Braxton v. Municipal Court*, 514 P.2d 697 (Cal. 1973), a case in which the state's highest court was asked to consider the constitutionality and construction of a California criminal statute that prohibited any person from "willfully disrupt[ing] the orderly operation of [a school] campus or facility," the court stated:

> [N]either the "content" of speech nor freedom of association can be restricted merely because such expression or association disrupts the tranquility of a campus or offends the tastes of school administrators or the public. Protest may disrupt the placidity of the vacant mind just as a stone dropped in a still pool may disturb the tranquility of the surface waters, but the courts have never held that such "disruption" falls outside the boundaries of the First Amendment.

Id. at 701. (construing the statute "to condemn unlawful disruptive, coercive conduct, not free expression").[11]

2. The government cannot empower the "heckler."

Petitioners misapprehend the concept of the "heckler's veto" and why it is so antithetical to the First Amendment. *See* LACSD Pet. at 14-15; *see also* 24-26; Roberts Pet. at 21-25. It is without question that the alleged "disturbance" attributed to Respondents was caused by the reaction that certain viewers were having to Respondents' speech. Petitioners admit as much. The proper, and constitutional, response, however, to such a "disturbance" is not to silence the speaker (i.e., empower the heckler), but to punish those who are reacting improperly (e.g., cite the drivers who are not obeying the traffic laws and punish the students who are disobeying the teacher, etc.).[12] *See Brown v.*

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[11] This case demonstrates that the Ninth Circuit was correct in holding that the California courts would construe § 626.8 so as *not* to apply to Respondents' speech, contrary to the arguments presented by Petitioner Roberts. *See* Roberts Pet. at 14.

[12] Indeed, Petitioner Roberts' exaggerated claim that "[t]he Ninth Circuit's opinion, if upheld, will wreak havoc in the administration of public schools," Roberts Pet. at 13, is less a commentary on the Ninth Circuit's decision than it is an indictment of the apparent inefficacy of school administrators. Nevertheless, school administrators can and always have been able "to invoke a reasonable time, place and manner restriction on disruptive speech adjacent to their schools." Roberts Pet. at 13. However, these government officials do not get a "hallway pass" that excuses them from the proscriptions of the First Amendment.

Louisiana, 383 U.S. 131, 133, n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."); *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) ("A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights.") (emphasis added); *see also Hedges v. Wauconda Comty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (stating, "the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto"). Otherwise, the government "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21.

In sum, it is utterly disingenuous for LACSD Petitioners to claim that the Ninth Circuit's ruling has somehow prevented them from performing their duties as law enforcement officers in a responsible fashion. *See* LACSD Pet. at 18, 23. Indeed, not *one* LACSD Petitioner took *any* legitimate step to ensure the safety of the students, seriously negating any claim that this was a significant issue. If LACSD Petitioners were so concerned about traffic and safety, they would have used their lawful authority to direct traffic and to protect the students from reckless or careless drivers, which, in turn, would have also protected Respondents and their free speech rights. Instead, Petitioners

empowered the hecklers and suppressed the speaker, which the First Amendment prohibits.

3. The government may not reduce the adult population to viewing only what is fit for children.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975), this Court expressed a fundamental rule of constitutional law that is controlling in this case: "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that [the government] thinks unsuitable for them." *Id.* at 213.

In its decisions, this Court has repeatedly affirmed the principle that the government may not "reduce the adult population . . . to [viewing] only what is fit for children." *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (holding unconstitutional a ban on the sale to adults of books deemed harmful to children); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-75 (1983) (holding unconstitutional a ban on mailing of unsolicited advertisements for contraceptives and noting, "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox").

In *Cohen v. California*, 403 U.S. 15 (1971), this Court reversed the conviction of a defendant who walked through a courthouse corridor—a place where *children*, among others, were present—wearing a jacket bearing the words "F*ck the Draft." In its

decision, the Court noted that rather than censoring the speaker, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[13] *Id.* at 21. As the Court cogently stated, "[W]e cannot indulge the facile assumption that one can forbid particular words [or pictures, as in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [or pictures] as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

And in *Reno v. ACLU*, 521 U.S. 844, 880 (1997), this Court held that the prohibition on knowingly communicating indecent material to minors in Internet forums was invalid because it conferred "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old-child . . . would be present." Similarly, in this case, Petitioners are inviting this Court to confer broad powers of censorship upon any parent, school administrator, or neighbor who opposes Respondents' political message by simply claiming that certain children are offended. This Court should reject the invitation.

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[13] Petitioner Roberts' claim that the students arriving at the school are a "captive" audience is nonsense. *See* Roberts Pet. at 22-25. The public streets adjacent to the school covered a large area, a significant portion of the streets are not visible from the school campus, and Respondents were traveling along the streets with many other vehicles. Thus, if any student wanted to avoid looking at the truck with the pictures, the student could have simply "averted his or her eyes," as the Constitution requires.

II. Petitioner's Application of § 626.8 Is Contrary to the Will of the California Legislature.

It was the reasoned and considered judgment of the California legislature, which was no doubt aware of the state's interest in maintaining an orderly classroom environment, that § 626.8 should not be employed in the manner in which Petitioners employed it here: to prohibit Respondents' right to freedom of speech. No law degree or crystal ball is needed to divine the intentions of the legislature (or the proper application of the law in this case), *see* LACSD Pet. at 33; it was made explicit in the very statute relied upon by Petitioners, which states, "This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly." Cal. Penal Code § 626.8; App. at 64a.

Consequently, Petitioners are seeking authority from this Court to circumvent the will of the legislature by upholding the improper and arbitrary application of this statute. Such arbitrary enforcement leads to significant constitutional problems. As demonstrated here, § 626.8 was being used to "delegate[] basic policy matters" to government officials "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *See Grayned*, 408 U.S. at 108-09. Petitioners' misuse of this statute to silence "offensive" or "disturbing" political speech inevitably forces citizens, such as Respondents, to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotations and ellipsis omitted).

In the final analysis, Petitioners are asking this Court to grant them the authority to enforce a California penal statute in a manner that the California legislature would not allow. This request must be denied.

III. LACD Petitioners' Seventy-Five Minute Detention Violated Respondents' Clearly Established Right To Be Free from Unreasonable Government Seizures.

A. Qualified Immunity Does Not Excuse LACSD Petitioners' Prolonged Detention.

LACSD Petitioners argue that they should be excused from any Fourth Amendment liability on qualified immunity grounds because the law at the time of the prolonged detention was unclear and because they faced novel circumstances. LACSD Pet. at 27-33. They are mistaken.

As an initial matter, the Ninth Circuit held that LACSD Petitioners had qualified immunity with regard to Respondent's *First Amendment* claim because, according to the court, under the present circumstances, "we cannot conclude that the law was sufficiently clear that a reasonable officer would know that it was unlawful to request [Respondents] to cease driving their truck around the area." App. at 27a.

However, because LACSD Petitioners enjoy qualified immunity on the First Amendment claim does not excuse their conduct with regard to Respondents' Fourth Amendment claim.

As the record reveals, any suspicion on the part of LACSD Petitioners that Respondents had violated a provision of the California Vehicle Code was dispelled within minutes. The record shows that LACSD Petitioners searched Respondents' vehicles, questioned Respondents, and checked for any outstanding warrants all within the first minutes of the detention, revealing no evidence of a crime. And the relevant section of the California Penal Code cited by LACSD Petitioners only makes it a crime for Respondents to remain in the vicinity of the school once they are asked to depart. However, Respondents "were not asked to leave until the *end* of the seventy-five minute detention, at which point they promptly left. So, with respect to § 626.8, the officers *at no time* had any reason to suspect that [Respondents] had committed or were about to commit this crime." App. at 30a.

Thus, the evidence shows that LACSD Petitioners' prolonged detention of Respondents was not so that they could investigate Respondents for possible criminal wrongdoing. "Instead, [LACSD Petitioners] continued to detain [Respondents] because they were waiting for their supervisors to help them figure out *whether* any crime had been committed." App. at 31a.

As the Ninth Circuit noted, "an officer's uncertainty about the law cannot excuse the detention. To permit otherwise 'would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce.'" App. at 31a (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)); *see also United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("[F]ailure to understand the law by the very person charged with enforcing it is *not* objectively reasonable.").

In sum, qualified immunity does not erect a shield of ignorance that protects LACSD Petitioners from liability for engaging in a prolonged "fishing expedition" to find some *legal* basis for charging a crime at the expense of Respondents' liberty—nor should it.

B. Respondents' Fourth Amendment Right To Be Free from LACSD Petitioners' Unreasonable Seizure Was Clearly Established.

There is no dispute that Respondents were not free to leave during the seventy-five minute detention and were, therefore, deprived of their liberty under the authority of law. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that a person has been "seized" within the meaning of the Fourth Amendment when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"); *see also United States v. Richardson*, 949 F.2d 851, 856-57 (6th Cir. 1991) ("It does not take formal words of arrest or booking at a police station to complete an arrest. It takes simply the deprivation of liberty under the authority of law.") (internal quotations and citations omitted); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 590 (6th Cir. 1994) (noting that a clear deprivation of liberty without formal words is nonetheless an arrest).

Moreover, "[t]he brevity and limited nature of *Terry*-type stops have been repeatedly affirmed." *United States v. Butler*, 223 F.3d 368, 374 (6th Cir. 2000); *see also Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) ("[T]he officer may ask the detainee a moderate number of questions to determine his

identity and to try to obtain information confirming or dispelling the officer's suspicion. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.") (footnotes omitted). And while there are no rigid time limitations, there are certainly limitations, which Petitioners exceeded. *See United States v. Chamberlin*, 644 F.2d 1262, 1267 (9th Cir. 1980) (holding that a 20-minute detention was unreasonable and noting that the defendant was not free to leave, as admitted by the officer, and that the officer detained the defendant "to find out what was going on"); *United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974) (stating that the detention "for over an hour cannot be considered a 'brief' or 'momentary' stop").

When assessing the reasonableness, and thus the legality, of LACSD Petitioners' actions, the crucial inquiry is "whether the police diligently pursued a means of *investigation* that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (emphasis added). And as the Ninth Circuit properly noted, "The investigative purposes permitted by detention are ones of fact, not law." App. at 31a.

In this case, LACSD Petitioners did not "diligently" pursue their investigation.[14] Rather, they held Respondents, preventing them from exercising their

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[14] In fact, LACSD Petitioners waited for *more than an hour* before speaking to any school officials, and this was a very brief conversation. ER-109-10, 161.

First Amendment rights, while the deputies fished for a violation of the law. *See, e.g., United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001), *amended by* 279 F.3d 1062 (2002) (holding that the prolonged, investigatory detention of the defendant violated the Fourth Amendment and that the subsequent search of the defendant's vehicle was unlawful, finding that the officer took advantage of the 7-minute records-check delay to engage in a "fishing expedition").

In sum, the Fourth Amendment standards applicable here were clearly established—and clearly violated by the deputies. Consequently, the Ninth Circuit properly held that LACSD Petitioners do not enjoy qualified immunity for their unreasonable detention of Respondents.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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